**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| R. SIDNEY SHAW, Personal Representative of the Estate of Gary Delguzzi, and CHARLES M. CRUIKSHANK, III,<br><br>Appellants,<br><br>v.<br><br>SHORT & CRESSMAN, SHORT CRESSMAN & BURGESS & SHORT CRESSMAN & BURGESS, PLLC, PAUL R. CRESSMAN, SR., JANE DOE CRESSMAN, JOHN O. BURGESS, JANE DOE BURGESS, ROBERT E. HEATON, JANE DOE HEATON, ROBERT J. SHAW, JANE DOE SHAW, ANDREW W. MARON, JANE DOE MARON, CHRISTOPHER J. OSBORN, JANE DOE OSBORN, JAMES A. OLIVER, JANE DOE OLIVER, CHICOINE & HALLETT, INC., P.S., DARRELL D. HALLETT, JANE DOE HALLETT, LARRY N. JOHNSON,<br><br>Respondents. | ) | NO. 60995-5-I<br><br>DIVISION ONE<br><br>Unpublished Opinion<br><br>FILED: May 18, 2009 |

Lau, J. — R. Sidney Shaw, personal representative of the estate of Gary DelGuzzi, appeals the trial court's summary judgment dismissal of the estate's

numerous claims against Short Cressman & Burgess (SCB), Chicoine & Hallett (C&H), and other individual attorneys. Shaw's complaint alleged that the attorneys' various acts of malfeasance harmed Gary DelGuzzi's interest in the estate of his father, Jack DelGuzzi. Shaw and his attorney Charles Cruikshank also appeal the trial court's imposition of sanctions against them. We conclude that Shaw's claims are conclusively barred by the statute of limitations. And the trial court did not abuse its discretion in determining that the lawsuit was frivolous. But the notice and findings were not sufficient to support the trial court's award of all attorney fees and costs as a sanction under CR 11 and RCW 4.84.185. Accordingly, we affirm the summary judgment dismissal of the case, and we affirm in part, reverse in part, and remand the sanctions awards.

## FACTS

Jack DelGuzzi, a successful real estate developer, died in 1978. The Clallam County Probate Court appointed Jack DelGuzzi's son and sole heir, Gary DelGuzzi, as personal representative (PR) of the estate. In April 1982, Gary DelGuzzi retained law firm SCB to represent him in his role as PR. Four months later, Gary DelGuzzi resigned and the probate court appointed William Wilbert as PR.[1] SCB then represented Wilbert as PR until 1991, when it withdrew due to nonpayment of attorney fees.

In 1991, after the Internal Revenue Service asserted multimillion dollar tax

[1] Wilbert also served as trustee of Gary DelGuzzi's trust until Gary DelGuzzi asked him to resign.

claims against the estate for which Wilbert faced potential personal liability, Wilbert retained law firm C&H to represent him personally. Because Gary DelGuzzi also faced potential personal tax liability, C&H referred him to another lawyer, Jeanette Cyphers.

Cyphers represented Gary DelGuzzi individually and as beneficiary[2] from 1992 to 1993. She concluded that Gary DelGuzzi and/or his trust might have claims against SCB and Wilbert. She also warned Gary DelGuzzi that the statute of limitations already had or might soon bar a lawsuit. In July 1993, Cyphers withdrew due to nonpayment of attorney fees. She reiterated her advice to Gary DelGuzzi and gave him all her records concerning the potential claims.

Gary DelGuzzi, represented by his new attorney Charles Cruikshank, then proceeded to commence a series of lawsuits and petitions against Wilbert and the attorneys and accountants who had worked with him. In February 1994, Gary DelGuzzi sued Wilbert in the Clallam County probate proceedings, alleging self-dealing and breach of fiduciary duty and seeking an accounting. In August 1994, he added SCB and attorney Paul Cressman as defendants in the probate action, seeking repayment of attorney fees. In July 1996, Gary DelGuzzi petitioned to remove Wilbert as administrator. The petition alleged malpractice and breach of fiduciary duty by SCB, malfeasance by Wilbert, and a conspiracy by SCB, Wilbert, and others to "milch the estate." Although C&H was not named as a defendant in that action, the petition asserted that C&H refused to make the final accounting or move to close the estate;

[2] Gary DelGuzzi's interest in the estate of Jack DelGuzzi was assigned to Gary DelGuzzi's trust.

rather, C&H attorneys "will assist Wilbert in selling off all of the estate properties and then distributing all of the sales proceeds to Wilbert and to his attorneys."

In October 1996, the Clallam County Superior Court dismissed without prejudice under CR 12(b)(6) the claims Gary DelGuzzi raised against SCB in his capacity as a beneficiary of the Jack DelGuzzi estate.[3] In a memorandum opinion, the court explained that under Trask v. Butler, 123 Wn.2d 835, 872 P.2d 1080 (1994), "[t]he law is clear that an heir does not have an action against the attorneys for the personal representative for legal malpractice. There is no duty owed from an attorney to an heir of the estate." Gary DelGuzzi did not appeal this dismissal. He did, however, continue litigation in the Clallam County probate proceedings.

In 1996, Wilbert petitioned to close the estate of Jack DelGuzzi. The probate court held a trial on the accounting. Gary DelGuzzi challenged the accounting on numerous grounds. He asserted that Wilbert had mishandled the estate's assets, particularly its Costa Rica holdings. He also asserted that C&H "advised Wilbert in structuring offers to the heir, Gary DelGuzzi" and "assisted Wilbert in claims made against him . . . related to questionable transactions in the Gary DelGuzzi Trust." The trial court approved Wilbert's final accounting in 1997.[4] Nevertheless, litigation

[3] The claims that Gary DelGuzzi raised against SCB in his individual capacity were dismissed under CR 12(b)(1) for lack of jurisdiction. Those claims are not at issue in this appeal.

[4] In a memorandum decision, the court found that Wilbert breached his duty to the estate by placing himself "in a situation where his self-interest could potentially conflict with the Estate" with respect to the Costa Rica transactions. But the court was "not prepared to make a finding" that these actions caused a loss to the Estate that Wilbert would have to repay.

continued and the probate court did not close the estate of Jack DelGuzzi until July 2007.[5]

Gary DelGuzzi died in February 2004, and Shaw became PR of the estate of Gary DelGuzzi. Wilbert died in March 2004. David Martin became interim PR of the estate of Jack DelGuzzi for two months in 2004.[6] In August 2004, Martin gained access to Wilbert's storage locker, removed certain files, and transported them to another storage facility where Cruikshank examined them. According to Shaw, these files were found to contain "smoking gun" documents that for the first time established that SCB and C&H colluded with Wilbert in "converting, embezzling, and milking the Estate, particularly as regards to the Costa Rica properties . . . ."

In August 2006, Shaw (represented by Cruikshank) filed a new action against SCB, C&H, and certain individual attorneys. Shaw's core allegations were that Wilbert, C&H, and SCB conspired to (1) hide and abandon Wilbert's professional negligence claims against SCB in exchange for SCB's silence regarding Wilbert's malfeasance in administering the estate and (2) support the nondisclosure, concealment, and misrepresentation of missing, undervalued, and converted estate assets in exchange for a fee agreement. Shaw further alleged breach of fiduciary duty, conversion, self-

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[5] Litigation concerning the Jack DelGuzzi probate proceedings in Clallam County and related claims brought by Gary DelGuzzi has resulted in three appellate opinions. DelGuzzi v. Wilbert, noted at 108 Wn. App. 1003, 2001 WL 1001082; DelGuzzi v. Wilbert, noted at 93 Wn. App. 1048, 1999 WL 10081; DelGuzzi v. Wilbert, noted at 105 Wn. App. 1004, 2001 WL 180995. Most recently, Shaw (represented by Cruikshank) appealed the probate court's 2007 decision to close the Jack DelGuzzi estate. Division Two heard oral argument on January 6, 2009; the decision is pending.

[6] Kathryn Ellis subsequently became PR of the estate of Jack DelGuzzi.

dealing, interference with business expectations, and violation of the Consumer Protection Act, and he challenged SCB's attorney fees as excessive and unwarranted.

A series of discovery disputes ensued, with the trial court ruling in defendants' favor on nearly every motion. In October 2007, SCB, C&H, and attorney Larry Johnson[7] moved for summary judgment dismissal of Shaw's claims. Shaw moved for partial summary judgment. In November 2007, the trial court granted SCB, C&H, and Johnson's motions, denied Shaw's motion, and dismissed all of Shaw's claims. The order granting summary judgment to the SCB defendants stated that Shaw's claims were barred by the applicable statutes of limitations and res judicata.[8] The order granting summary judgment to the C&H and Johnson defendants stated that Shaw's claims were barred by the applicable statutes of limitations, absence of duty, and failure to identify legally sufficient facts that C&H actually harmed Shaw through the alleged activity.[9]

After dismissing Shaw's claims, the trial court granted the defendants' motions

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[7] The defendants below, and respondents on appeal, consist of three groups: (1) SCB, plus several of its individual attorneys and their spouses, (2) C&H, plus its attorney Darrell D. Hallett and his spouse, and (3) C&H attorney Larry Johnson and his spouse. The Johnsons joined in some of C&H's arguments and motions below, and adopt portions of C&H's brief on appeal.

[8] In its oral ruling, the trial court stated that summary judgment in favor of the SCB defendants was also granted on the basis of Trask.

[9] In its oral ruling, the trial court stated that summary judgment in favor of the Johnson defendants was also granted on the basis of judicial proceedings immunity. The court also stated that it did not reach the substance of any of Shaw's claims, despite language in the order suggesting that it did. Report of Proceedings (RP) (Nov. 9, 2007) at 47.

for an award of all attorney fees and costs against Shaw and Cruikshank under RCW 4.84.185 and CR 11. Shaw responded by filing a CR 60 motion to vacate the sanctions awards along with a CR 11 motion to sanction the defendants. The trial court denied Shaw's motions and entered orders granting the full amount of defendants' attorney fees and costs incurred in defending against Shaw's claims, beginning with commencement of the lawsuit in August 2006. These awards came to a total of $935,375.47.

Shaw now appeals the summary judgment dismissal of his claims, several related discovery orders, and the sanctions awards.[10]

ANALYSIS

Statute of Limitations

The trial court granted summary judgment to all respondents and dismissed Shaw's claims because they were time barred. Shaw argues that this was error. "In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court." Wingert v. Yellow Freight Sys., Inc., 146 Wn.2d 841, 847, 50 P.3d 256 (2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court will consider the facts and reasonable inferences in the light most

[10] Despite being the named plaintiff, Shaw's interest in this litigation is tangential at best. In 2007, Martin acquired from Shaw the Jack DelGuzzi estate's claims against Wilbert. Shaw testified that he reviewed no files and had no personal or firsthand knowledge of any matters in the complaint. And Cruikshank testified that any recovery in the present lawsuit would be divided between himself and Martin. If so, the only parties who would benefit from any recovery against respondents are Martin and Cruikshank.

favorable to the nonmoving party. Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1, 140 Wn.2d. 403, 406, 997 P.2d 915 (2000). "Resolution of disputed factual issues can be sustained when reasonable minds could reach but one conclusion from the evidence accompanying a summary judgment motion." Sundquist, 140 Wn.2d at 406–07. "To defeat summary judgment, [the nonmoving party's] evidence must set forth specific, detailed, and disputed facts; speculation, argumentative assertions, opinions, and conclusory statements will not suffice." Sanders v. Woods, 121 Wn. App. 593, 600, 89 P.3d 312 (2004).

The purpose of the statute of limitations is to prevent stale claims. Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C., 109 Wn. App. 655, 662, 37 P.3d 309 (2001). The statute of limitations "does not begin to run until the cause of action accrues—that is, when the plaintiff has a right to seek relief in the courts." Sabey v. Howard Johnson & Co., 101 Wn. App. 575, 592–93, 5 P.3d 730 (2000). "The discovery rule provides that a cause of action does not accrue until an injured party knows, or in the exercise of due diligence should have discovered, the factual bases of the cause of action." Beard v. King County, 76 Wn. App. 863, 867, 889 P.2d 501 (1995). The rule "does not require knowledge of the existence of a legal cause of action itself." Richardson v. Denend, 59 Wn. App. 92, 95–96, 795 P.2d 1192 (1990). "'[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.'" Clare v. Saberhagen Holdings, Inc., 129 Wn. App. 599, 603, 123 P.3d 465 (2005) (quoting Hawkes v. Hoffman, 56 Wash. 120, 126, 105 P. 156 (1909)). The plaintiff bears the burden of

proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period. G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc., 70 Wn. App. 360, 367, 853 P.2d 484 (1993). Whether a party exercised due diligence is a factual issue that may be determined as a matter of law when reasonable minds could reach but one conclusion. Clare, 129 Wn. App. at 603. See also Cawdrey v. Hanson Baker Ludlow Drumheller, P.S., 129 Wn. App. 810, 818, 120 P.3d 605 (2005) (second suit against attorney who facilitated transactions at issue in first suit was time barred because it involved "in part" the same transactions, thus demonstrating plaintiff's knowledge of facts).

SCB represented Wilbert as PR of the Jack DelGuzzi estate from 1982 until 1991. C&H commenced its representation of Wilbert in 1991. Shaw's complaint raised claims of conspiracy, breach of fiduciary duty, conversion, self-dealing, interference with business expectations, Consumer Protection Act (CPA) violations, excessive attorney fees, and legal malpractice. The limitations period for the CPA claim is four years. RCW 19.86.120. The limitations period for the remaining claims is three years. RCW 4.16.080. The events that form the basis of Shaw's complaint took place in the 1990s. Thus, Shaw's 2006 claims are time barred unless he can demonstrate that the discovery rule or a related doctrine tolled the statute of limitations.

Shaw argues that the discovery rule applies because he could not have discovered his claims within the limitations period. He does not dispute that he learned about the alleged injuries more than three years before filing his 2006 complaint. But he contends that prior to 2004—when Martin and Cruikshank discovered the "smoking

gun" documents—the only known evidence indicated that Wilbert, acting alone, was solely responsible for losses to the estate.

We disagree. The record conclusively demonstrates that Shaw knew or should have known the factual basis of his claims many years ago, including the alleged involvement of SCB and C&H. First, in 1993, Jeanette Cyphers expressly informed Gary DelGuzzi about the concerns raised by C&H regarding SCB's tax advice, as well as her concerns regarding Wilbert's estate transactions. Second, Gary DelGuzzi's 1994–96 lawsuits against SCB alleged a conspiracy based on secret agreements between SCB and Wilbert and the charging of excessive fees by SCB. Third, even though C&H was not named as a defendant in the prior actions, Gary DelGuzzi and Cruikshank have long asserted that Wilbert mishandled the estate's assets while C&H represented him, particularly the Costa Rica properties. The 1996 complaint asserted that C&H intended to assist Wilbert in selling off the estate properties and distributing the proceeds to the attorneys. Similarly, Gary DelGuzzi's 1997 trial brief, which detailed Wilbert's alleged mishandling of the estate's Costa Rica assets, also asserted that C&H "advised Wilbert in structuring offers to the heir, Gary DelGuzzi." Fourth, Martin admitted that the 2006 lawsuit involves the "same parties, same conspiracy, same damages, just a continuation" of the prior litigation.

The 2004 discovery of the so-called "smoking gun" documents does not change this result. Contrary to Shaw's assertion, "the law does not require a smoking gun in order for the statute of limitations to commence." Giraud v. Quincy Farm & Chem., 102 Wn. App. 443, 450, 6 P.3d 104 (2000).

> An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. At that point, the potential harm with which the discovery rule is concerned—that remedies may expire before the claimant is aware of the cause of action—has evaporated. The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. If the discovery rule were construed as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time barred.

Beard, 76 Wn. App. at 868.

Cruikshank asserted that "it seemed like Mr. Wilbert was acting alone until those documents surfaced in 2004," and that "until those documents were discovered in 2004, it was my belief that the attorneys were not part of Mr. Wilbert's activities." But Gary DelGuzzi, represented by Cruikshank, actually sued SCB in 1994 for allegedly conspiring with Wilbert. And many of the same issues were raised in the 1997 trial. They knew or should have known the factual basis of their claims in the 1990s. The later discovery of additional evidence does not trigger the discovery rule.[11]

Shaw further argues that the discovery rule should be tolled by (1) the fraudulent concealment doctrine, (2) an alleged fiduciary relationship between Gary DelGuzzi and C&H, and (3) the continuing representation doctrine. Shaw did not raise these arguments at the trial court, and we need not address them. RAP 9.12; Van Dinter v. Orr, 157 Wn.2d 329, 333–34, 138 P.3d 608 (2006). Nevertheless, even if Shaw had

[11] The so-called smoking gun documents include (1) a 1994 tolling agreement between Wilbert and SCB and (2) a 1998 letter from C&H attorney Darrell Hallett to SCB attorney John Burgess agreeing that court-approved administrative fees would be split 50–50 between Wilbert and SCB. It is not clear how this evidence supports Shaw's conspiracy claims. There is nothing inherently improper about tolling agreements or fee sharing arrangements.

raised these issues below, our decision would not be different. "Fraudulent concealment cannot exist if a plaintiff has knowledge of the evidence of an alleged defect. Additionally, they are required to demonstrate that they were reasonably diligent in their efforts to discover" the allegedly withheld information. Giraud, 102 Wn. App. at 455 (citation omitted). And a fiduciary relationship does not abrogate the due diligence requirement of the discovery rule. Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 517, 728 P.2d 597 (1986). As discussed above, Shaw knew or should have known the facts giving rise to the 2006 lawsuit. And Gary DelGuzzi, whose estate Shaw represents, was never a client of C&H. Rather, C&H represented Wilbert. The continuing representation doctrine "tolls the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged malpractice occurred." Janicki, 109 Wn. App. at 661. The continuing representation doctrine does not apply to nonclient adversaries.

Shaw also argues that the trial court erred in granting summary judgment (1) to SCB based on lack of standing and res judicata, (2) to C&H because he submitted sufficient evidence of C&H's involvement in a conspiracy, and (3) to Johnson because the doctrine of judicial proceedings immunity does not apply. Because we hold that Shaw's claims against all respondents are time barred, we need not reach these arguments.

Shaw's Motions to Strike

Shaw challenges the trial court's denial of his motion to strike exhibits attached to (1) Guy Michelson's declaration in support of SCB's motion for summary judgment

and (2) Gregory Schwartz's declaration in support of C&H's motion for summary judgment. The Michelson and Schwartz declarations stated that the attached documents were true and correct and based on personal knowledge. Shaw argues that the challenged documents were not properly authenticated because Michelson and Schwartz failed to make an affirmative showing of personal knowledge as required by CR 56(e) and ER 602.[12] "[W]e review the trial court's evidentiary rulings made for summary judgment de novo." Seybold v. Neu, 105 Wn. App. 666, 678, 19 P.3d 1068 (2001).

"CR 56(e) is explicit in its requirements which serve the ultimate purpose of a summary judgment motion. Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein." Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988). But personal knowledge is not necessarily required.

"Authentication is a threshold requirement designed to assure that evidence is what it purports to be." State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). "CR 56(e) allows an attorney to base his or her affidavit on documents properly before the court. And this includes documents already in the court files, as well as additional documents presented by the parties in a motion for summary judgment." Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 745, 87 P.3d 774 (2004). CR

[12] ER 602 provides, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. . . ."

56(e)'s "requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact finder to find in favor of authenticity." Int'l Ultimate, 122 Wn. App. at 746; ER 901(a) (authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). If the challenged documents "are properly authenticated [under ER 901 or 902] and are not excluded because of hearsay, then an attorney may rely on them in a summary judgment motion regardless of any lack of personal knowledge." Int'l Ultimate 122 Wn. App. at 746. "[A]uthentication may be satisfied when the party challenging the document originally provided it through discovery." Int'l Ultimate 122 Wn. App. at 748.

C&H and SCB responded to Shaw's motion to strike by clarifying that all of SCB's challenged documents and all but five of C&H's challenged documents were authenticated because they were produced by Shaw in discovery, authenticated by deposition testimony, or relied on by Shaw. C&H also argued that Shaw had no basis to dispute the authenticity of the remaining documents, all of which related to tax matters concerning the estate of Jack DelGuzzi. SCB and C&H contend that this showing was sufficient to establish the authenticity of the challenged documents under International Ultimate. C&H further argues that the authenticity of the five remaining documents was established because they were copies of public documents filed in the Clallam County probate case, were Gary DelGuzzi's tax-related filings, or were official communications from the IRS subject to judicial notice.

We conclude that the trial court did not err in denying Shaw's motion to strike. Any concern about the adequacy of the initial declarations was eliminated by SCB and

C&H's response to Shaw's motion to strike.[13] Moreover, Shaw did not argue below or on appeal that the trial court abused its discretion in admitting the documents because they were inadequately authenticated under ER 901 or the rules enunciated in International Ultimate. He argued only that the documents were not adequately authenticated by personal knowledge.

SCB's Motion to Strike

SCB moved to strike certain exhibits filed in support of Shaw's motion for partial summary judgment, arguing that they constituted inadmissible hearsay or were improperly authenticated. The trial court granted the motion and struck the exhibits. Shaw argues that this was error because his authenticating declaration was made on his "personal knowledge and with proper foundation." Br. of Appellant, at 18. Shaw has not supported this claim of error with adequate argument or references to the record, and we will not address it.[14] RAP 10.3(a)(5); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Discovery Master

[13] In a footnote, Shaw seems to argue that SCB and C&H failed to cure their deficient authenticating declarations because their clarifying responses were not filed with their summary judgment motion 28 days before the hearing as required by CR 56(c). But Shaw filed his motion to strike on November 1, 2007, eight days before the summary judgment hearing. SCB and C&H's clarifications, submitted on November 7 and 8, were filed in response to Shaw's motion. The trial court has the discretion to accept affidavits filed anytime before issuing its final summary judgment order. Brown v. Peoples Mortgage Co., 48 Wn. App. 554, 559–60, 739 P.2d 1188 (1987); CR 6(b). Shaw did not argue that the trial court abused its discretion in accepting the clarifications.

[14] Shaw contends that the stricken evidence included fee invoices that establish SCB's liability as a matter of law. But this evidence, even if considered, cannot overcome summary judgment dismissal of his claims based on the statute of limitations.

Shaw moved for appointment of a discovery master, specifically requested the individual who was appointed, participated in drafting the order of appointment, and signed the order. Shaw now argues that the trial court erred by denying his subsequent motion to amend the order by imposing numerous procedural requirements on the discovery master. Pretrial discovery orders are reviewed for manifest abuse of discretion. Gillett v. Conner, 132 Wn. App. 818, 822, 133 P.3d 960 (2006).

Shaw's argument lacks merit. CR 53.3 requires only that the discovery master be a lawyer admitted to practice in the state of Washington and that the compensation of the master be fixed by the court. Whether to impose additional procedural requirements on the discovery master is a matter within the trial court's discretion. CR 53.3(d) (the order "may specify the duties of the master"). The trial court did not abuse its discretion in denying Shaw's motion.[15] Moreover, Shaw invited the alleged error by participating in drafting the order appointing the discovery master. He cannot now complain of it on appeal. Humbert/Birch Creek Constr. v. Walla Walla County, 145 Wn. App. 185, 192, 185 P.3d 660 (2008).

Discovery Order—Sanctions

During discovery, David Martin resisted C&H's repeated discovery requests and attempts to subpoena him. The day before his deposition, Martin sought a continuance for medical reasons, which C&H allowed. Three weeks later, shortly before his

[15] Shaw argued below that Federal Rule of Civil Procedure 53 supported his motion to impose additional requirements on the discovery master. He has abandoned this meritless argument on appeal.

rescheduled deposition, Martin moved for a protective order and failed to appear. Defendants opposed the protective order, moved to compel Martin's deposition, moved to compel him to produce documents, and moved for an award of attorney fees under CR 26(c) and CR 37(a)(4) and/or sanctions under CR 11.[16] The trial court found that Martin "has engaged in bad-faith refusals to participate in or respond to discovery." CP 1843. It denied Martin's motion for a protective order, granted the defendants' motion to compel Martin's deposition, and granted the defendants' request for sanctions "in the amount of their reasonable attorney fees and costs incurred in connection with these combined motions."

Shaw does not argue that the trial court erred in finding that Martin engaged in bad-faith refusals to participate or respond to discovery. Rather, he contends that noncompliance with a subpoena by a nonparty had to be enforced through a contempt of court proceeding under CR 45 and Burlingame v. Consolidated Mines & Smelting Co. 106 Wn.2d 328, 333, 722 P.2d 67 (1986) (in contempt proceeding, due process requires that show cause order give notice of time and place of hearing). Shaw further contends that the trial court deprived Martin of due process by entering the sanctions

[16] CR 26(c) provides, "If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion." And CR 37(a)(4) provides that if a motion for order compelling discovery is granted, "the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

order without notice and a hearing.

We disagree. CR 26(c) and CR 37(a)(4) permit the court to award attorney fees and costs incurred in seeking a motion to compel discovery and responding to an unsuccessful motion for protective order. And the record shows that Cruikshank had notice that respondents were seeking sanctions. Cruikshank appeared in court and asserted that he was unprepared for oral argument because he did not know the motion was being heard that day. But the trial court gave him an opportunity to speak before announcing its ruling in open court. RP (July 20, 2007) at 6. The trial court did not abuse its discretion or violate Shaw's due process rights by ordering Martin to pay respondents' fees and costs incurred in connection with these motions.

Frivolous Lawsuit—Sanctions

Shaw and Cruikshank argue that the trial court abused its discretion in awarding attorney fees and costs in full to SCB, C&H, and Johnson under both RCW 4.84.185 and CR 11.[17] The standard of review regarding sanctions under the statute or rule is abuse of discretion. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 903, 969 P.2d 64 (1998).

Sanctions Under CR 11

CR 11 provides that the trial court may impose sanctions for two types of problems related to legal filings—those that are not well grounded in fact and

[17] Courts have interpreted CR 11 and RCW 4.84.185 to authorize an award of both attorney fees and costs to the prevailing party. See, e.g., State ex rel., Wash. Pub. Disclosure Comm'n v. Permanent Offense, 136 Wn. App. 277, 295, 150 P.3d 568 (2006).

warranted by law and filings interposed for any improper purpose. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). "The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system." Bryant, 119 Wn.2d at 219. "CR 11 is not meant to act as a fee shifting mechanism, but rather as a deterrent to frivolous pleadings." MacDonald v. Korum Ford, 80 Wn. App. 877, 891, 912 P.2d 1052 (1996). "In deciding whether to impose sanctions, the court should evaluate a party's prefiling investigation by inquiring what was reasonable for the attorney to have believed at the time he filed the complaint." Manteufel v. Safeco Ins. Co. of Am., 117 Wn. App. 168, 68 P.3d 1093 (2003). "A trial court may not impose CR 11 sanctions for a baseless filing 'unless it also finds that the attorney who signed and filed the [pleading, motion for legal memorandum] failed to conduct a reasonable inquiry into the factual and legal bases for the claims.'" MacDonald, 80 Wn. App. at 884 (quoting Bryant, 119 Wn.2d at 220). "[T]he court must make explicit findings as to which pleadings violated CR 11 and as to how such pleadings constituted a violation of CR 11. The court must specify the sanctionable conduct in its order." N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 649, 151 P.3d 211 (2007). "'If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision.'" MacDonald, 80 Wn. App. at 892 (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 883 (5th Cir. 1988)).

Shaw and Cruikshank argue that the trial court abused its discretion in entering CR 11 sanctions because the respondents did not give notice that they intended to

seek sanctions until after the trial court dismissed the claims on summary judgment. SCB contends that it provided adequate notice because after the trial court granted summary judgment, counsel called Cruikshank and expressly informed him of their intent to move for fees under CR 11. SCB and C&H further contend that they provided sufficient notice prior to summary judgment because their answers to Shaw's complaint asserted that the action was time barred and stated that they would be seeking fees and costs as appropriate. C&H also points to various filings in which it asserted that Shaw and Cruikshank acted improperly or in bad faith.

Although we agree that Shaw's complaint was frivolous and advanced without reasonable cause, we conclude that SCB and C&H did not provide sufficient notice to support CR 11 sanctions. "[A] party should move for CR 11 sanctions as soon as it becomes aware they are warranted." N. Coast, 136 Wn. App. at 649. "[W]ithout prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper." Biggs, 124 Wn.2d at 198.

> "[Deterrence] is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions."

Biggs, 124 Wn.2d at 198 (quoting In re Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986)). "Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible." Biggs, 124 Wn.2d at 198. "Without such notice, CR 11 sanctions are unwarranted." Biggs, 124 Wn.2d at 198.

Our review of the record shows that SCB and C&H did not provide any notice of intent to seek sanctions—formal or informal—until after the trial court granted summary judgment. None of the documents filed by SCB and C&H prior to summary judgment expressly mentioned the possibility of sanctions for filing a frivolous lawsuit. The trial court's findings did not address whether or not SCB and C&H notified Shaw and Cruikshank as soon as possible. SCB and C&H were plainly aware of the facts and circumstances giving rise to their CR 11 motion well before the trial court granted summary judgment. Only Johnson provided adequate notice by raising CR 11 in his answer to Shaw's complaint. Because SCB and C&H gave no notice prior to summary judgment, but Johnson did, we conclude that CR 11 sanctions are warranted only for Johnson.

Shaw and Cruikshank also argue that the CR 11 fee award was excessive because (1) the defendants unjustifiably delayed moving for summary judgment while incurring huge fees and (2) only a small fraction of their billable time was spent drafting and arguing the motion for summary judgment. The respondents argue that they were entitled to reimbursement for all fees and costs incurred in defending the action from its inception because the filing of the frivolous action required extensive discovery, legal research, briefing, and court appearances, culminating with the granting of summary judgment 14 months later.

"In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule." Biggs, 124 Wn.2d at 197. "The burden of proving the reasonableness of the fees requested is upon the fee

applicant." Scott Fetzer v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). "'When attorney fees are granted under CR 11, the trial court "must limit those fees to the amounts reasonably expended in responding to the sanctionable filings."'" MacDonald, 80 Wn. App. at 891 (quoting Biggs, 124 Wn.2d at 201). "In considering whether a fee is 'reasonable,' the trial court must also consider whether those fees and expenses could have been avoided or were self-imposed." MacDonald, 80 Wn. App. at 891. "Generally, this award of reasonable fees should not exceed those fees which would have been incurred had notice of the violation been brought promptly." Biggs, 124 Wn.2d at 201. "'A party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures.'" MacDonald, 80 Wn. App. at 891 (quoting Miller v. Badgley, 51 Wn. App. 285, 303, 753 P.2d 530 (1988)).

We conclude that Shaw and Cruikshank raise valid concerns regarding the reasonableness and necessity of the CR 11 fee award. The trial court's findings and conclusions supporting the fee award were entirely conclusory. The court awarded the respondents every penny of the attorney fees and costs they requested—nearly a million dollars in total—without considering whether some of those fees and costs could have been avoided or mitigated or finding that an award of all fees and costs was the least severe sanction necessary. And it did not sufficiently explain the basis for its findings that the fees were reasonable and necessary. In addition, our review of the billing records supports Shaw and Cruikshank's contention that the trial court did not engage in the type of review contemplated by Mahler.[18] We cannot determine whether

[18] For example, Johnson's time records include all expenses associated with

the trial court considered whether any of the fees charged were unnecessary, duplicative, or unproductive. See Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (outlining generally how a trial court should determine "reasonable hours"). These circumstances suggest that the trial court may have improperly used CR 11 sanctions as a fee-shifting mechanism and did not limit the amount to the minimum necessary. See Biggs, 124 Wn.2d at 201.

"[I]n addition to analyzing whether or not the lower court abused its discretion, we also assert our 'supervisory role to ensure that discretion is exercised on articulable grounds.'" Peterson v. Koester, 122 Wn. App. 351, 363–64, 92 P.3d 780 (2004) (quoting Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998)). "Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." Mahler, 135 Wn.2d at 435. Accordingly, we vacate Johnson's award of attorney fees and costs under CR 11 and remand for entry of findings and conclusions regarding the scope and amount of the fee award.

Sanctions Under RCW 4.84.185

RCW 4.84.185 allows the trial court to order the nonprevailing party to pay the prevailing party's reasonable expenses, including attorney fees, when the action as a whole is frivolous and advanced without reasonable cause. Quick-Ruben, 136 Wn.2d

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at 903. A lawsuit is frivolous under RCW 4.84.185 when it cannot be supported by any rational argument on the law or facts. Smith v. Okanogan County, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). "The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite. Skimming v. Boxer, 119 Wn. App. 748, 756, 82 P.3d 707 (2004) (citing Suarez v. Newquist, 70 Wn. App. 827, 832–33, 855 P.2d 1200 (1993)). The award must be supported by written findings. Havsy v. Flynn, 88 Wn. App. 514, 521, 945 P.2d 221 (1997).

Shaw does not challenge the adequacy of the trial court's findings regarding the respondents' entitlement to sanctions under RCW 4.84.185. He merely argues that "the Complaint shows substantial merit, thus vitiating any award of sanctions." Appellants' Br. at 49. He further contends that under Roberts v. Bechtel, 74 Wn. App. 685, 875 P2d 14 (1994), the trial court erred in awarding sanctions under RCW 4.84.185 because the defendants' fees and costs were covered by their insurers.

We disagree. Shaw's claims were plainly time barred. Furthermore, Roberts is inapposite. That case involved a fee request that was barred by a stipulation and settlement agreement. The court held that the insurer's attorney, who did not sign the agreement, could not recover fees under RCW 4.84.185 because the insurer was not a party to the litigation. Roberts, 74 Wn. App. at 686–87. Here, there was no settlement agreement barring a fee award. The trial court did not abuse its discretion in concluding that Shaw's lawsuit was frivolous and advanced without reasonable cause.[19]

Shaw, however, correctly asserts that Johnson missed the 30-day statutory deadline for moving for an award of fees under RCW 4.84.185. Accordingly, we affirm the trial court's findings regarding SCB and C&H's entitlement to statutory attorney fees and costs, but reverse as to Johnson's entitlement on this basis.

Shaw also argues that the RCW 4.84.185 fee award was excessive. Unlike CR 11, RCW 4.84.185 does not require prompt notice or an opportunity for mitigation. The statute expressly authorizes the trial court to award payment for "the reasonable expenses, including fees of attorneys, incurred" in defense of the frivolous action. Nevertheless, in awarding reasonable attorney fees under RCW 4.84.185, the trial court must sufficiently explain the objective basis for its fee award to permit appellate review. Highland Sch. Dist. No. 203 v. Racy, ___Wn. App. ___, 202 P.3d 1024, 1029 (2009). As discussed above, the trial court's findings and conclusions were too conclusory regarding the scope and amount of fees to permit appellate review. Accordingly, we vacate the award of attorney fees to SCB and C&H and remand for entry of findings and conclusions to sufficiently explain the basis of the fee award.[20]

[19] We observe that the trial court did not find that the lawsuit was initiated for the purposes of harassment, delay, nuisance, or spite. But Shaw did not challenge the award on this basis.

[20] Shaw also argues that the trial court erred in entering CR 11 sanctions against him because he did not sign any pleadings, motions, or memoranda in violation of the rule. Similarly, Cruikshank argues that the court erred in entering RCW 4.84.185 sanctions against him. This argument mischaracterizes the trial court's order. The court did not specifically sanction Shaw under CR 11 and Cruikshank under RCW 4.84.185. Rather, it found violations of both CR 11 and RCW 4.84.185 and ordered Shaw and Cruikshank to pay the defendants' attorney fees and costs.

Denial of Shaw's CR 11/CR 60 Motions

Shaw argues that the trial court abused its discretion in denying his motion to vacate the sanctions order under CR 60[21] and his motion to sanction the defendants under CR 11. Shaw did not assign error to this issue, and we need not address it. RAP 10.3(a)(4); RAP 10.3(g). In any case, the defendants' request did not amount to misconduct and was not frivolous or improper.[22]

Motion to Strike Appendix Materials

SCB's respondents' brief contains an appendix consisting of five items that are not available in the trial court record and were not made part of the record on appeal. SCB requested permission to include these materials under RAP 10.3(a)(8), which provides, "An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." Shaw moved to strike SCB's appendix and requested sanctions against SCB under RAP 18.9.

RAP 10.4(d) and RAP 17.4(d) provide, "A party may include in a brief only a

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[21] Shaw relies specifically on CR 60(b)(4) (relief from an order based on fraud, misrepresentation, or other misconduct of an adverse party) and CR(b)(11) (any other reason justifying relief). A trial court's ruling under CR 60(b) is reviewed for abuse of discretion. Showalter v. Wild Oats, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

[22] Shaw also assigned error to the trial court's order granting SCB's motion for protective order regarding his discovery requests related to attorney fees and costs. But Shaw does not argue the issue in his brief, and we will not address it. RAP 10.3(a)(6); Timson v. Pierce County Fire Dist. No. 15, 136 Wn. App. 376, 385, 149 P.3d 427 (2006).

motion which, if granted, would preclude hearing the case on the merits." SCB's motion does not meet this requirement. Accordingly, we deny the request and grant Shaw's motion to strike the appendix.[23] Because SCB's request was not egregious, sanctions are not warranted.

Attorney Fees on Appeal

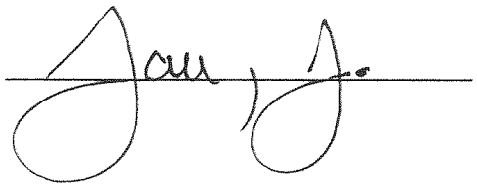
C&H and Johnson request an award of attorney fees for defending against a frivolous appeal under RAP 18.1(a), RAP 18.9(a), RCW 4.84.185, and CR 11. An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. In re Recall Charges Against Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). Because the sanctions issues are not devoid of merit, we decline to award attorney fees on appeal.

## CONCLUSION

In sum, we affirm the trial court's summary judgment dismissal of Shaw's claims. Regarding SCB and C&H's entitlement to attorney fees and costs, we reverse the award based on CR 11, affirm the award based on RCW 4.84.185, and remand to the trial court to reconsider the amount awarded and for entry of findings and conclusions

[23] On May 1, 2009, Shaw submitted an appellants' supplemental authority and declaration of counsel consisting of evidentiary materials. C&H filed a motion to strike. We agree with C&H that these materials do not qualify as additional authorities under RAP 10.8. See Giedra v. Mt. Adams Sch. Dist. No. 209, 126 Wn. App. 840, 845 n.1, 110 P.3d 232 (2005) (arbitrator's decision in related matter "does not qualify as an additional authority under RAP 10.8."). Shaw made no attempt to establish that these materials were before the trial court or included in the clerk's papers. No rule permits Shaw to supplement the record in this manner. We grant C&H's motion to strike.

consistent with this opinion. Regarding Johnson's entitlement to attorney fees and costs, we reverse the award based on RCW 4.84.185, affirm the award based on CR 11, and remand to the trial court to reconsider the amount awarded and for entry of findings and conclusions consistent with this opinion.



WE CONCUR: